No. 85-1530

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM E. BROCK, SECRETARY OF LABOR, AND ALAN C. MCMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, APPELLANTS

v.

ROADWAY EXPRESS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE APPELLANTS

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QUESTION PRESENTED

Whether Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), which provides that the Secretary of Labor—upon a finding of "reasonable cause to believe" that an employee in the motor transportation industry was discharged in retaliation for the employee's safety complaints—"shall" order the temporary reinstatement of the employee pending a hearing regarding the reasons for the discharge, is invalid under the Due Process Clause of the Fifth Amendment because the Secretary is not required to afford the employer an evidentiary hearing before issuing the temporary reinstatement order.

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OPINIONS BELOW

The order of the district court (J.S. App. 1a-10a) is reported at 624 F. Supp. 197. The prior order of the district court granting appellee's motion for a preliminary injunction (J.S. App. 11a-19a) is reported at 603 F. Supp. 249. The Secretary's findings and preliminary order (J.S. App. 20a-23a) are unreported. The recommended decision and order of the administrative law judge (J.S. App. 29a-43a) are unreported.

JURISDICTION

The judgment of the district court (J.S. App. 24a) was entered on November 18, 1985. The notice of

appeal to this Court was filed on December 17, 1985 (J.S. App. 25a-26a, 27a-28a). On February 6, 1986, Justice Powell issued an order extending the time within which to docket this appeal to and including March 17, 1986. The jurisdictional statement was filed on that date, and this Court noted probable jurisdiction on May 19, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 405(a) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(a), provides:

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because such employee (or any person acting pursuant to a request of the employee) has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding.

3. Section 405(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. 2305(c), provides:

> (1) Any employee who believes he has been discharged, disciplined, or otherwise discriminated against by any person in violation of subsection (a) or (b) of this section may, within one hundred and eighty days after such alleged violation occurs, file (or have filed by any person on the employee's behalf) a complaint with the Secretary of Labor alleging such discharge, discipline, or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify the person named in the complaint of the filing of the complaint.
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> (2)(A) Within sixty days of receipt of a complaint filed under paragraph (1) of this subsection, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify the complainant and the person alleged to have committed a violation of this section of his findings. Where the Secretary of Labor has concluded that there is reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order providing the relief prescribed by subparagraph (B) of this paragraph. Thereafter, either the person alleged to have committed the violation or the complainant may, within thirty days, file objections to the findings or preliminary order, or both, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be expeditiously conducted. Where a hearing is not timely requested, the preliminary order shall be deemed a final order which is not subject to judicial review. Upon the conclusion of such hearing, the Secretary of Labor shall issue a final order within one hundred and twenty days. In the interim, such proceedings may be terminated at any time on the basis of a settle-

ment agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) If, in response to a complaint filed under paragraph (1) of this subsection, the Secretary of Labor determines that a violation of subsection (a) or (b) of this section has occurred, the Secretary of Labor shall order (i) the person who committed such violation to take affirmative action to abate the violation, (ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, and (iii) compensatory damages. If such an order is issued, the Secretary of Labor, at the request of the complainant may assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

STATEMENT

1. Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. App. (& Supp. II) 2305, prohibits employers in the motor transportation industry from taking retaliatory action against employees who assert their rights to safe working conditions. The statute provides that "[n]o person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee filed a complaint or otherwise instituted a proceeding "relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order," or because the employee refused for safety reasons to operate a commercial motor vehicle. 49 U.S.C. App. 2305(a) and (b).[1]

An employee who "believes he has been discharged, disciplined, or otherwise discriminated against by any person" in violation of these statutory protections may file a complaint with the Secretary of Labor (49 U.S.C. App. 2305(c)(1)).[2] Upon receipt of a complaint, the Secretary is required to "notify the person named in the complaint of the filing of the complaint" (*ibid.*). The Secretary must then investigate the complaint in order to "determine whether there is reasonable cause to believe that the complaint has merit" (49 U.S.C. App. 2305(c)(2)(A)).[3] If the Secretary

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[1] The statute defines a "commercial motor vehicle" as a vehicle used "principally to transport passengers or cargo" that has a weight rating of ten thousand or more pounds, is designed to transport more than ten persons, or is used to transport hazardous materials. 49 U.S.C. App. 2301(1).

[2] The Secretary has delegated his authority under Section 405 to the Assistant Secretary for Occupational Safety and Health, who, in turn, has delegated this authority to the Regional Administrators of the Occupational Safety and Health Administration.

[3] The Secretary has adopted detailed written procedures governing the investigation of complaints filed by employees under Section 405. The current version of these procedures requires the Labor Department investigator to interview the complainant and encourage the complainant to identify witnesses who can support his allegations. The investigator must also "contact the [employer], notify the [employer] of the substance of the complaint and arrange to meet with the [employer] or its counsel to interview the appropriate witnesses." OSHA Instruction DIS.4A, at V5 (Aug. 26, 1985). The written procedures emphasize that the investigator should

concludes as a result of the investigation that there is "reasonable cause to believe that a violation has occurred, he shall accompany his findings with a preliminary order" providing for (1) abatement of the retaliatory conduct, (2) reinstatement of the employee to his or her former position, and (3) back pay and any other compensatory damages (*ibid.*).

The employee or the employer may file objections to the Secretary's findings and request a "hearing on the record," which "shall be expeditiously conducted" (49 U.S.C. App. 2305(c)(2)(A)). The statute specifically provides that the filing by the employer of objections to the Secretary's findings and a request for a hearing "shall not operate to stay any reinstatement remedy contained in the preliminary order" (*ibid.*). The hearing is held before an administrative law judge (ALJ), who issues a recommended decision that is reviewed by the Secretary. The Secretary must issue a final order within 120 days of the conclusion of the hearing (49 U.S.C. App. 2305(c)(2)(A)).[4] The order is subject to judicial review in the

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obtain evidence corroborating the complainant's allegations, secure the employer's response to the allegations, and attempt to corroborate the employer's response (*id.* at V5-V7). The procedures in effect at the time of the events in this case similarly required the investigator to consult with the employer. OSHA Instruction CPL 2.45A CH-4, at X5 (Mar. 8, 1984); OSHA Instruction DIS.6, at 4, 8-9 (Dec. 12, 1983); OSHA Investigation Manual at V1, V13-V14 (1979). We have lodged copies of these written procedures with the Clerk of this Court and served a copy of the procedures upon counsel for appellee.

[4] The Secretary has interpreted the statute to require the issuance of a final order within 120 days after the ALJ's issuance of his recommended decision.

appropriate court of appeals (49 U.S.C. App. 2305(d)(1)).[5]

2. Appellee, "one of the nation's largest over-the-road carriers" (J.A. 80), is engaged in the business of operating commercial motor vehicles interstate, principally to transport cargo (J.S. App. 1a, 20a). Appellee is therefore subject to the requirements of Section 405. 49 U.S.C. App. 2301(3); J.S. App. 1a, 20a; J.A. 90.

On November 22, 1983, appellee discharged one of its truck drivers, Jerry Hufstetler, allegedly because Hufstetler had committed an act of dishonesty: appellee asserted that Hufstetler had intentionally disabled several of the lights on his truck, creating a false breakdown in order to obtain extra pay. On November 27, 1983, Hufstetler filed a grievance under the National Master Freight Agreement, a collective bargaining agreement between appellee and Teamsters Local Union No. 528, claiming that he had been fired in retaliation for his repeated safety-related requests for repairs to his truck. The grievance proceeded to arbitration in accordance with the agreement. The first arbitration panel was unable to reach a decision on the grievance; the second arbitration panel rejected Hufstetler's claim on January 30, 1984. J.S. App. 1a-2a, 21a; J.A. 40-76, 91-92.

Hufstetler filed a complaint with the Secretary of Labor on February 7, 1984, alleging that he had been discharged in violation of Section 405 of the Surface Transportation Assistance Act because he was discharged in retaliation for his requests for safety

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[5] If neither the employer nor the employee requests a hearing, "the preliminary order [is] deemed a final order which is not subject to judicial review" (49 U.S.C. App. 2305(c)(2)(A)).

repairs. The Secretary notified appellee of Hufstetler's complaint and began an investigation of Hufstetler's allegations. J.S. App. 2a, 21a. In the course of the investigation, appellee was afforded "the opportunity to fully state and support [its] positions" (J.A. 79). Appellee submitted a "written position statement with supporting affidavits explaining the circumstances of [the] discharge" together with a copy of the arbitration decision. J.A. 93; see also *id.* at 6. Appellee's attorney subsequently submitted a letter setting forth appellee's legal arguments and presented appellee's views orally at a meeting with Labor Department officials (J.A. 6-7, 93).

The Secretary's 11-month investigation found "credible, independent evidence" supporting Hufstetler's allegations (J.A. 79). On January 21, 1985, the Secretary concluded that there was reasonable cause to believe that appellee had discharged Hufstetler in violation of Section 405 and issued a preliminary order directing appellee to reinstate Hufstetler (J.S. App. 3a, 20a-23a). The Secretary found that "[Hufstetler] had a two year history of bringing vehicle safety problems to the attention of [appellee] and had complained to [the Department of Transportation] and to elected public officials. These complaints constitute protected activity under the [Surface Transportation Assistance] Act" (*id.* at 22a). The Secretary further found that "[appellee] had warned [Hufstetler] and threatened to get him due to his excessive breakdowns due to [Hufstetler's] recognition of safety violations" and that "[appellee] had threatened to do anything [it] could to catch [Hufstetler] doing something wrong, to get rid of him" (*id.* at 21a, 22a).

With respect to appellee's allegation that Hufstetler had been dishonest, the Secretary determined

that "[appellee's] evidence to support the discharge is conjecture. [Hufstetler] has presented evidence to support his innocence" (J.S. App. 21a). Based on these facts, the Secretary concluded that "[appellee's] termination of [Hufstetler's] employment was discriminatorily motivated by [Hufstetler's] protected activity" (*id.* at 22a), and he ordered appellee "to immediately offer reinstatement to [Hufstetler]," to compensate Hufstetler with back pay, and "to expunge from [Hufstetler's] personnel records any adverse references to his discharge or any protected activity" (*id.* at 23a).

3. On February 1, 1985—11 days after the Secretary's issuance of the preliminary order—appellee commenced this action in the United States District Court for the Northern District of Georgia, seeking an injunction against the enforcement of the Secretary's order and a declaratory judgment that the Secretary's order was unconstitutional. Appellee claimed that the issuance of the reinstatement order without a prior "evidentiary hearing" violated its due process rights (J.A. 9-10). The district court issued a preliminary injunction barring enforcement of the Secretary's reinstatement order (J.S. App. 11a-19a).[6]

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[6] Appellee also filed objections to the Secretary's findings and a request for an on-the-record hearing pursuant to 49 U.S.C. App. 2305(c)(2)(A). The hearing was held before an administrative law judge on March 26-29, 1985, and the ALJ issued his recommended decision and order on October 30, 1985 (J.S. App. 29a-43a). The ALJ observed that Hufstetler had filed numerous safety-related complaints (*id.* at 32a-35a, 39a-41a) and found that "[t]he record is replete with many statements by [appellee's] supervisors demonstrating their animus toward [Hufstetler] as a result [of] his engaging in protected activities. The issuance of warning letters to [Hufstetler], while other employees were not repri-

On November 18, 1985, the district court issued an order granting appellee's motion for summary judgment (J.A. App. 1a-10a). The court declared Section 405(c)(2)(A) "unconstitutional and void to the extent that it empowers [appellants] to order reinstatement of discharged employees prior to conducting an evidentiary hearing" (J.S. App. 9a). Accordingly, the court entered a permanent injunction "restrain[ing] and enjoin[ing] [appellants] from further issuance of preliminary orders of reinstatement * * * without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process" (*ibid.*).[7]

The district court observed that in order to ascertain the requirements of due process it is necessary to consider "the private interest affected by the government's action; the risk of an erroneous deprivation of such interest through the procedures used; and, the government's interest, including the function involved and the administrative and fiscal burdens that the additional procedural requirement would entail" (J.S. App. 6a). The court found that

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manded for similar acts, and the acrimonious statements cause the conclusion that the discharge had a retaliatory motive" (*id.* at 41a). The ALJ further found that the evidence did not indicate that Hufstetler was discharged for a reason other than his safety-related activities (*id.* at 41a-42a). The ALJ's recommended decision is pending before the Secretary; appellee has raised a number of objections to the ALJ's recommended decision. See Mot. to Aff. 5-6 n.4, A1-A9.

[7] The district court also held that appellee was not required to exhaust its administrative remedies (J.S. App. 4a-5a), that the controversy between the parties was not moot (*id.* at 5a), and that the district court did not lack jurisdiction over appellee's claim (*ibid.*). We have not sought review of these determinations.

appellee had "important interests in not being compelled to reinstate an employee discharged for wrongful conduct and in upholding the arbitration provisions of its bargaining agreement" (*ibid.*).

The court further found that "the procedures used by [the Department of Labor] were inherently unreliable, inasmuch as they did not provide any means for resolving disputed issues of fact and credibility. An evidentiary hearing, prior to mandatory reinstatement, would clearly strengthen the reliability of the procedures and the ultimate decision, and hedge against the risk of erroneous deprivation" (J.S. App. 8a (citation omitted)). The court also noted that the Secretary "failed to make available the names and statements of witnesses upon which [the] decision was based" (*id.* at 7a).

With respect to the government's interest, the court concluded that "[a]lthough the governmental interests in promoting safety on the highways and prohibiting retaliatory discharge are indeed valid, [the Department of Labor] has failed to show any compelling considerations which necessitate postponing the hearing" (J.A. App. 8a). It found that "the administrative or fiscal burdens attendant to such a hearing prior to reinstatement would be negligible" because the statute already provides for a post-reinstatement hearing (*ibid.*).

Weighing these considerations, the court found that the temporary reinstatement procedures set forth in the statute failed to provide employers with a "meaningful opportunity to be heard" (J.S. App. 9a). The court concluded that the requirements of due process could be satisfied only through a prereinstatement "evidentiary hearing" at which the employer is afforded "at minimum, an opportunity to present his side and a chance to confront and cross examine witnesses" (*id.* at 8a-9a).

SUMMARY OF ARGUMENT

This case concerns a challenge under the Due Process Clause of the Fifth Amendment to an essential element of a statute enacted by Congress to maintain and improve highway safety. Congress concluded that its safety program should encourage motor carrier employees to report violations of federal highway safety standards. It therefore enacted Section 405 of the Surface Transportation Assistance Act of 1982, which expressly prohibits discharge, discipline, or discrimination in retaliation for an employee's safety-related activities. In order to alleviate employees' fears of interim losses of jobs on account of safety complaints, the statute further provides that an employee who alleges that he was discharged in violation of Section 405 must be reinstated on a temporary basis, without a prior evidentiary hearing, if the Secretary finds reasonable cause to believe that the discharge was in fact retaliatory.

Before issuing such a temporary reinstatement order, the Secretary affords the employer notice and an opportunity to present evidence and state his views. In addition, Section 405 provides for a prompt post-reinstatement evidentiary hearing regarding the legality of the discharge. Despite these procedural protections, however, the district court held that Section 405 violates the Due Process Clause. The court concluded that the Constitution prohibits the temporary reinstatement remedy created by Congress because an evidentiary hearing must be conducted *before* the issuance of a reinstatement order. That determination not only ignores settled principles of deference to legislative determinations in assessing the constitutionality of an Act of Congress, it also reflects a fundamental misunderstanding of this

Court's decisions interpreting the Due Process Clause and of Congress's objectives in enacting Section 405.

This Court has considered in a variety of contexts the question whether the Due Process Clause requires that an evidentiary hearing be held prior to a temporary deprivation of property when a full post-deprivation hearing is provided under the relevant statutory scheme. The "ordinary principle" established by this Court's decisions is that due process is satisfied by "something less than an evidentiary hearing * * * prior to adverse administrative action" (*Mathews* v. *Eldridge*, 424 U.S. 319, 343 (1976)). In only one case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), has the Court required a full adversarial hearing before an initial deprivation of property, and the "crucial factor" in that case was that an erroneous decision would deprive an eligible welfare recipient of "the means to obtain essential food, clothing, housing, and medical care" (397 U.S. at 264 (footnote omitted)). An employer plainly would not suffer such drastic adverse consequences as a result of the issuance of a temporary reinstatement order; and, although the court below ignored this interest, the employee would suffer serious consequences if he is discharged for a lengthy period for a reason ultimately found to be unlawful. Under these circumstances, due process requires at most that the employer be provided with notice and an informal opportunity to respond prior to the issuance of the temporary order.

An assessment of the specific interests relevant to the due process inquiry confirms this conclusion. The employer's private interest is relatively insubstantial because an employer required to pay the wages of a reinstated employee receives the benefits of the em-

ployee's labor. Although the employer does suffer some reduction in his control over his workforce by virtue of the temporary nullification of his decision to discharge one of his employees, the significance of this consideration is reduced by the fact that the employer's control of the workforce already is limited by statute and employment contracts. Thus, the interest of the employer affected by the temporary order simply is not substantial.

On the other hand, the governmental interest implicated by the temporary reinstatement order is quite weighty. The order furthers the government's interest in promoting public safety by encouraging motor carrier employees to engage in safety-related conduct. The court below failed to recognize that the threat of a lengthy temporary discharge could be a substantial deterrent to safety complaints. But the increased delay in obtaining reinstatement for wrongfully discharged employees that would result from the elimination of the temporary reinstatement remedy undoubtedly would reduce employees' willingness to engage in safety-related activity. Requiring the Secretary to afford employers an evidentiary hearing before issuing a reinstatement order thus would reduce the effectiveness of Congress's safety program.

Finally, the procedures utilized by the Secretary of Labor in determining whether to issue a temporary reinstatement order under Section 405 significantly reduce the risk of erroneous determinations. The notice and opportunity to respond provided to employers—together with the requirement that the Secretary find "reasonable cause to believe" that the discharge was unlawful (49 U.S.C. App. 2305(c)(2)(A))—serve as the "initial check against mistaken decisions" generally required by this Court in connection

with temporary deprivations of property (*Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 12).

The district court erroneously concluded that an evidentiary hearing is always required to resolve disputed issues of fact in the temporary deprivation context. Even where factual disputes are involved, this Court has rarely concluded that the risk of an erroneous decision is so great as to require the government to stay its hand pending an evidentiary hearing. Notice and an opportunity to respond are all that is necessary to provide a sufficient check against erroneous decisionmaking. Since the procedures followed by the Secretary under Section 405 plainly satisfy that standard, the temporary reinstatement remedy should be upheld.

ARGUMENT

THE TEMPORARY REINSTATEMENT REMEDY SET FORTH IN SECTION 405(c) DOES NOT VIOLATE THE DUE PROCESS CLAUSE

The guarantee of procedural due process contained in the Fifth Amendment requires the government to treat an individual with fundamental fairness when it deprives him of his liberty or his property. *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 14; *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24-25 (1981). Like "fundamental fairness" itself, a term "whose meaning can be as opaque as its importance is lofty" (*Lassiter*, 452 U.S. at 24), procedural due process is "not a technical conception with a fixed content unrelated to time, place and circumstances" (*Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961)). Rather, due process is a "flexible concept," with the procedural requirements

mandated by the Constitution depending upon the specific circumstances of the particular deprivation of liberty or property. *Walters* v. *National Association of Radiation Survivors*, slip op. 14; see also *Lassiter*, 452 U.S. at 24, 31; *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976).

This constitutional guarantee does not, of course, apply to every situation in which an individual is affected adversely by government action. The threshold question in assessing any claim that the government has failed to provide the requisites of procedural due process is whether the challenged government action deprived the claimant of a liberty or property interest that is protected by the Due Process Clause. *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 4-5; *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972).

Appellee had a contractual right to discharge its employees for cause.[8] Although the power of Congress to regulate in this area is very broad, we do not dispute that appellee's right to discharge constitutes a property interest protected by the Due Process Clause and that the Secretary's order—had it gone into effect—would have deprived appellee of this interest by requiring the reinstatement of an employee previously discharged by appellee.[9]

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[8] The contract between appellee and its employees indicates that appellee generally is free to terminate an employee for just cause so long as the employee has received at least one warning notice. Discharges for dishonesty and certain other infractions need not be preceded by a warning. J.A. 37-39.

[9] We also note, as the court below failed to do, that there is a competing private interest—that of the employee in not being wrongfully discharged (see pages 33-38, *infra*).

"Once it is determined that due process applies, the question remains what process is due" (*Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333, quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); see also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). As we have discussed (see pages 5-6), Section 405 provides employers such as appellee with several opportunities to be heard in connection with the assessment of the legality of a discharge. In the course of the investigation of an employee's complaint, the employer is given an opportunity to respond to the employee's charges and present witnesses and documentary evidence in support of its position. If the Secretary of Labor finds reasonable cause to believe that the discharge violated the statute, the employer may request a "hearing on the record," which "shall be expeditiously conducted" (49 U.S.C. App. 2305(c)(2)(A)).[10] Appellee contends that these procedures are inadequate under the Constitution, however, because an evidentiary hearing should be conducted *before* an employer may be required to reinstate a previously discharged employee, even when the reinstatement is on a temporary basis subject to the outcome of a later evidentiary hearing. Thus, the sole question before the Court in this case is

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[10] The provisions of the Administrative Procedure Act governing adjudications apply to the conduct of such hearings. 5 U.S.C. 554(a) (providing that such requirements apply "in every case of an adjudication required by statute to be determined on the record after opportunity for an agency hearing"). Thus, an employer is entitled to an independent hearing examiner, use of oral and documentary evidence, cross-examination of adverse witnesses, and other trial-type procedures (5 U.S.C. 556, 557).

whether Congress's remedy of temporary reinstatement prior to the evidentiary hearing comports with the requirements of the Due Process Clause in the present circumstances.

The Court long has recognized that "[j]udging the constitutionality of an Act of Congress is properly considered ' " the gravest and most delicate duty that this Court is called upon to perform." ' " *Walters*, slip op. 13, quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted). The starting point in undertaking this task is "the strong presumption in favor of the validity of congressional action" (*Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982)), which rests on the fact that Congress's adoption of the statute constitutes the "duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters*, slip op. 13; see also *Rostker* v. *Goldberg*, 453 U.S. at 64.

Moreover, "[t]his deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment" (*Walters*, slip op. 14). In view of the flexible nature of the requirements of due process, courts should be particularly receptive to legislative efforts to tailor administrative procedures to a specific decisional context. As the Court has observed, "[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy. * * * [T]he courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process * * *." *Landon* v. *Plasencia*,

459 U.S. 21, 34-35 (1982); see also *Walters*, slip op. 20.

The district court ignored these basic principles of constitutional adjudication and fundamentally misapplied this Court's decisions concerning the Due Process Clause in striking down the temporary reinstatement remedy set forth in Section 405(c). To discover the requisites of procedural due process, it is necessary to "first consider[] any relevant precedents and then * * * assess[] the several interests that are at stake" in the particular situation (*Lassiter* v. *Department of Social Services*, 452 U.S. at 25). This Court's decisions regarding temporary deprivations of property and an evaluation of the specific interests implicated in the present context establish beyond any doubt that Section 405(c) affords an employer all of the procedural protection required by the Constitution.

A. The Due Process Clause Almost Never Requires The Government To Hold An Evidentiary Hearing Before Effecting A Temporary Deprivation Of Property

This Court has considered in a variety of contexts the question whether the Due Process Clause requires that an evidentiary hearing be held prior to a temporary deprivation of property when a full post-deprivation hearing is provided under the relevant statutory scheme. The Court has consistently rejected claims that an evidentiary hearing, complete with an opportunity to confront and cross-examine witnesses, must be held before the government may temporarily deprive an individual of his property. The " 'ordinary principle' " established by the Court's decisions is that " 'something less than an evidentiary hearing is sufficient prior to adverse administrative action.' "

Mackey v. *Montrym*, 443 U.S. 1, 13 (1979) (citation omitted); see also *Loudermill*, slip op. 8-9, 12; *Mathews*, 424 U.S. at 343.

In *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), the Court upheld the constitutionality of a state statute authorizing the issuance of an ex parte sequestration order that deprived a property owner of the possession of personal property without any prior notice or opportunity for a hearing. The statute required the filing of an affidavit and bond by the party seeking the order and specified that the order could be issued only by a judge. In addition, the owner of the property was free to seek the dissolution of the order immediately after the seizure of the property.

The Court concluded that the statute "effect[ed] a constitutional accommodation of the conflicting interests of the parties" (416 U.S. at 607). The creditor was able to protect his security interest by obtaining control of the property, and the property owner was protected by the bond posted by the creditor and by the availability of post-sequestration judicial relief. The Court found that the statutory procedure established "an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits" (*id.* at 618).[11]

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[11] Ex parte proceedings also are permissible where "swift action is necessary to protect the public health and safety." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 301 (1981) (upholding the issuance of orders requiring the immediate closure of surface mining operations under the Surface Mining Control and Reclamation Act of 1977); see also *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599-602 (1950) (summary seizure under the Federal Food, Drug, and Cosmetic Act of misbranded goods is permissible where there is probable cause to believe that the misbranding is fraudulent or would result in injury or damage to the purchaser or user); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306, 313-321 (1908) (upholding the seizure and destruction of unwholesome food products under a municipal ordinance without any prior notice or hearing). Predeprivation notice and a hearing also are not required in other circumstances in which predeprivation procedures are not feasible. See *Hudson* v. *Palmer*, 468 U.S. 517 (1984); *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

In most other situations, the Court has upheld predeprivation procedures against constitutional challenge as long as the party to be affected by the government action is provided with notice of the case against him and "an informal opportunity to tell his side of the story." *Mackey* v. *Montrym*, 443 U.S. at 14; see also *Loudermill*, slip op. 12. This predeprivation hearing "need not definitively resolve the propriety of the [government action]. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges * * * are true and support the proposed action." *Loudermill*, slip op. 12; see also *Mackey* v. *Montrym*, 443 U.S. at 13; *Bell* v. *Burson*, 402 U.S. 535, 540 (1971). These limited procedural protections have been found to be sufficient to satisfy due process because the deprivation of property is temporary and "prompt postdeprivation review is available for correction of administrative error." *Mackey* v. *Montrym*, 443 U.S. at 13; see also *Loudermill*, slip op. 13-14.

For example, in *Barry* v. *Barchi*, 443 U.S. 55 (1979), the Court held that an evidentiary hearing was not required prior to the temporary suspension of a horse trainer suspected of complicity in the

drugging of a race horse. The Court stated that "the State is entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues, whenever it has satisfactorily established probable cause to believe that a horse has been drugged and that a trainer has been at least negligent in connection with the drugging" (443 U.S. at 64). The Court held that the finding of the testing official that the horse was drugged, combined with a state law evidentiary presumption, was sufficient to establish probable cause. It noted that the trainer "was given more than one opportunity to present his side of the story to the State's investigators" (*id.* at 65), and concluded that these procedures "sufficed for the purposes of probable cause and interim suspension" (*id.* at 66).

The Court has reached the same conclusion in a variety of other factual settings, holding that notice and an opportunity to respond—not an evidentiary hearing—are all that the Constitution requires prior to a temporary deprivation of property. *Loudermill*, slip op. 9-12 (employee discharge); *Mackey* v. *Montrym*, 443 U.S. at 13-19 (suspension of driver's license); *Dixon* v. *Love*, 431 U.S. 105, 112-113 (1977) (same); *Mathews*, 424 U.S. at 332-349 (termination of disability benefits); *Goss* v. *Lopez*, 419 U.S. 565, 582-584 (1975) (suspension of student from school); *Arnett* v. *Kennedy*, 416 U.S. 134, 170 (1974) (opinion of Powell, J.) (employee discharge); *id.* at 196-202 (opinion of White, J.); see also *McClelland* v. *Massinga*, 786 F.2d 1205, 1210-1216 (4th Cir. 1986) (diversion of tax refund from taxpayer); *Signet Construction Corp.* v. *Borg*, 775 F.2d 486, 489-490 (2d Cir. 1985) (withholding contract payments); cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 119-126 (1975) (adversarial hearing not required before depriving an individual of his liberty prior to trial).[12]

The Court has departed from this settled rule "[i]n only one case, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), [where] the Court required a full adversarial evidentiary hearing prior to adverse governmental action" (*Loudermill*, slip op. 12). The Court held in *Goldberg* that a recipient of welfare benefits must be afforded an evidentiary hearing prior to the termination of such benefits. The Court stated that "the crucial factor in this context—a factor not present in the case of * * * virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immedi-

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[12] Appellee argues (Mot. to Aff. 10-13) that the Court has concluded that these predeprivation procedures satisfy due process only where the administrative decision does "not turn on resolving disputed questions of fact, credibility, or veracity" (*id.* at 11). That assertion is incorrect. In *Loudermill*, for example, the Court observed that the propriety of the dismissal of the government employee "turned not on [an] objective fact * * *, but on the subjective question whether [the employee] had lied on his application form." Slip op. 10 n.9; see also *Barry*, 443 U.S. at 65-66 (evidentiary hearing not required despite factual dispute regarding trainer's negligence in connection with drugging of race horse); *Mackey* v. *Montrym*, 443 U.S. at 15 ("even when disputes as to the historical facts do arise, we are not persuaded that the risk of error inherent in the statute's initial reliance on the representations of the reporting officer is so substantial in itself as to require that the [government] stay its hand pending the outcome of any evidentiary hearing necessary to resolve questions of credibility or conflicts in the evidence"); page 42, *infra*.

ately desperate" (397 U.S. at 264 (emphasis in original)).

The limited scope of the Court's decision in *Goldberg* was confirmed by its determination in *Mathews* v. *Eldridge*, *supra*, that a recipient of disability benefits is entitled only to notice and an informal opportunity to respond prior to the termination of his benefits. The Court found that an evidentiary hearing is not required because the hardship resulting from an erroneous deprivation of disability benefits, while "significant," is "likely to be less than that [imposed upon] a welfare recipient." 424 U.S. at 342; see also *Walters*, slip op. 27 ("dispositive" factor in *Goldberg* was that welfare recipients depended upon benefit payments "for their daily subsistence").

This Court's decisions make clear that the temporary reinstatement remedy at issue in this case does not violate the Constitution. *Goldberg* plainly is inapplicable because the consequences of the temporary restriction upon appellee's right to discharge one of its employees do not in any way resemble the hardship incurred by a welfare recipient who is deprived of his benefits. Appellee's property interest is instead sharply limited. See pages 26-30, *infra*.

The present case more closely resembles the situation in *Mitchell*: the employer and the discharged employee each possess interests in the "property" at issue—the discharged employee's job—and the question addressed by Section 405 is how to allocate the interim burden of a disputed discharge pending a final resolution of the legality of the discharge. The power of Congress to regulate the surface transportation industry with regard to matters affecting safety and conditions of employment is, of course, extremely broad. In view of the offsetting interest of employees

in that industry in not being temporarily discharged for what prove to be unlawful reasons under federal law, Congress could, we submit, have imposed any reasonable method of selecting who, as between employer and employee, will bear the interim burden while the legality of a discharge is determined. As we discuss below (see pages 47-49), Congress chose an eminently reasonable method of accommodating these interests when it enacted Section 405.

Finally, the prereinstatement procedures afforded under Section 405(c) are essentially identical to the process that the Court has found to be required in connection with temporary deprivations of more significant property interests. The employer is made aware of the charges against him and afforded an opportunity to present his side of the story regarding the discharge; the reinstatement order must be preceded by a finding of "reasonable cause" to believe that the employer violated the applicable statutory standard (49 U.S.C. App. 2305(c)(2)(A)); and the statute provides a prompt post-deprivation evidentiary hearing (49 U.S.C. App. 2305(c)(2)(B)). The statute therefore amply affords employers the procedural protection required by the Constitution prior to the issuance of a temporary reinstatement order. A fuller review of the interests implicated by a temporary reinstatement order confirms the correctness of this conclusion.

B. Consideration Of The Factors Identified By This Court in *Mathews* Clearly Demonstrates That The Temporary Reinstatement Remedy Satisfies The Requirements Of Procedural Due Process

The Court has made clear that "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the pri-

vate interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335; see also *Loudermill*, slip op. 9. An assessment of these factors makes clear that the procedures currently followed by the Secretary provide an employer with all the predeprivation process that could possibly be required in this setting.

1. ***Appellee's private interest***

The property interest affected by a temporary reinstatement order issued pursuant to Section 405(c) is the employer's right to discharge an employee for cause. By requiring the employer to reinstate a previously discharged employee, the order temporarily deprives the employer of this interest. It is clear, however, that the adverse consequences of this deprivation of property are extremely limited. The employer must pay the employee's salary pending a final determination of the legality of the discharge, but the employer, in turn, receives "the benefit of the employee's labors" (*Loudermill*, slip op. 11). The adverse effect of the deprivation of property is largely mitigated by the fact that the employer receives value in return for the funds he is required to expend.

The only adverse consequence actually suffered by an employer is a reduction in his control over his workforce: he is unable to discharge an employee who he alleges is unsatisfactory. The district court noted that " '[p]rolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.' " J.S. App. 7a, quoting *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693, 703 (6th Cir. 1985); see also *Arnett* v. *Kennedy*, 416 U.S. at 168 (opinion of Powell, J.).

A reinstatement order obviously does limit an employer's absolute authority over the workforce, but, in assessing the magnitude of this consequence, it is important to note that the employer's authority is already circumscribed in a variety of ways. First, of course, he has no legal right to discharge an employee for safety complaints; depending on the ultimate outcome of the proceeding, therefore, a reinstatement order is either a mere implementation of that undoubtedly valid prohibition or a temporary restriction while the necessary determination is made. Other federal statutes forbid an employer from basing employment decisions upon characteristics such as race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a)(1); see also 29 U.S.C. (& Supp. II) 623 (age discrimination). And appellee's contract with its employees limits its discharge authority in the same manner as the reinstatement order, requiring appellee to reinstate an employee when a discharge is successfully challenged under the contract's arbitration procedures (J.A. 37-39). Thus, the sole effect of the reinstatement order is to impose some additional restriction in an area in which appellee already has lost a considerable degree of control.[13]

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[13] Appellee suggests (Mot. to Aff. 8 n.6) that a reinstatement order would interfere with other "private property interests" because "it [would have] the effect of displacing employees junior to the complainant on the seniority roster and bumping an employee to lay-off status." Of course, a

The adverse consequences suffered by an employer such as appellee in this setting are much less significant than the adverse consequences resulting from virtually all of the temporary deprivations of property previously considered by this Court. The Court observed in *Goldberg* v. *Kelly*, *supra*, that the with-

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temporary reinstatement order does not require an employer to lay off an employee; any such layoff is a result of the employer's own choice and cannot be characterized as a necessary consequence of the reinstatement order, especially in a company the size of appellee. Moreover, an employee hired after the challenged discharge takes his position subject to being displaced as a result of the rehiring of his predecessor (J.A. 82). The reinstatement order accordingly does not disrupt his expectations.

Appellee also observes (Mot. to Aff. 8 n.6) that the reinstatement order "had the effect of upsetting an arbitration decision rendered under the collective bargaining agreement which had sustained the * * * discharge." But this is simply another way of stating that the order deprived appellee of its right to fire its employee; if the arbitration decision had overturned the discharge, appellee would have been required to reinstate its employee and the reinstatement order would have been unnecessary. The existence of the arbitration decision thus adds nothing to the analysis. Moreover, the arbitration decision rejecting the employee's claim clearly did not bar the Secretary from considering the complaint challenging the discharge. See *McDonald* v. *City of West Branch*, 466 U.S. 284 (1984) (arbitration decision finding that discharge was supported by just cause does not bar employee from challenging discharge under 42 U.S.C. 1983); *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728, 745-746 (1981) (unfavorable arbitration decision does not bar subsequent suit based on the same facts alleging violation of Fair Labor Standards Act); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (adverse arbitration decision does not bar employee from challenging discharge under Title VII of the Civil Rights Act of 1964, and federal court need not defer to arbitrator's decision).

drawal of welfare benefits threatens recipients with the deprivation "of the very means by which to live" (397 U.S. at 264). The discharge of a government employee similarly could "depriv[e] [the employee] of the means of livelihood" (*Loudermill*, slip op. 9). Other decisions have involved a license necessary to pursue one's livelihood (*Barry* v. *Barchi*, *supra*) and a drivers' license, the suspension of which could cause "personal inconvenience and economic hardship" (*Mackey* v. *Montrym*, 443 U.S. at 11). Each of these government actions thus threatens the individual subjected to the temporary deprivation of property with immediate hardship. See Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1295-1304 (1975) (discussing severity of government action). In terms of hardship, the adverse consequences to an *employee* of a wrongful temporary loss of his job come closer to the Court's past cases than do the consequences to the *employer* of a wrongful temporary reinstatement.

An incremental reduction in the employer's control of his workforce, which involves one employee out of many and may not result in any adverse economic consequences, cannot be equated with these situations. The deprivation of property at issue here simply does not have the significant, life-altering adverse consequences that the Court has cited in concluding that due process requires specific procedural protections in connection with temporary deprivations of property. The present case instead resembles the consequences of the sequestration order at issue in *Mitchell*, where the property owner lost only the control of his property, and was protected to a large degree against economic loss. See page 20, *supra*. In view of the quite minor adverse consequences visited upon an employer as a result of the temporary deprivation of his prop-

erty interest, a relatively small amount of procedural protection should be sufficient to satisfy due process.[14] Of course, as we discuss below, even if these consequences are regarded as the equivalent of the consequences of a deprivation of these other sorts of property interests, the process provided by Section 405 is sufficient to satisfy the Constitution.

2. ***The government's interest***

In sharp contrast to the relatively minor nature of the employer's private interest affected by Section 405(c), the governmental interests furthered by the temporary reinstatement remedy are extremely weighty. This Court has observed several times that government has a "paramount" interest in "preserv-

[14] Appellee argues (Mot. to Aff. 15) that "[t]he period of time that an employer would be required to have a reinstated individual on its payroll is a factor to be considered in measuring the weight of the private property interest." As we have discussed (see page 6), the statute imposes limitations upon the amount of time that the temporary order would remain in effect; these time limits comport with those that the Court previously has found permissible. See *Loudermill*, slip op. 13 (nine months); *Mathews*, 424 U.S. at 342 (10-11 months). The particular delay in this case is irrelevant because the "very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'" *Walters*, slip op. 15, quoting *Mathews*, 424 U.S. at 344; see also *Parham* v. *J.R.*, 442 U.S. 584, 612-613 (1979). Appellee has not shown that the length of delay in this case is typical of Section 405(c) proceedings generally. See also page 49, *infra*. Finally, the length of time obviously also affects the burden on the employee, should his claim of unlawful discharge be vindicated.

ing the safety of its public highways." *Mackey* v. *Montrym*, 443 U.S. at 17; see also *Dixon* v. *Love*, 431 U.S. at 114. The legislative history of the safety provisions of the Surface Transportation Assistance Act of 1982, which include the employee protection provision at issue here, establishes that Congress enacted these provisions in order to promote highway safety and thereby curb the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." 128 Cong. Rec. S15610 (daily ed. Dec. 19, 1982) (summary of safety provisions submitted by Sen. Danforth).[15]

Evidence before Congress revealed that "[t]ruck and bus accidents play[ed] a major role in th[e] unacceptable" increase in deaths and injuries on the nation's highways (S. Rep. 96-547, 96th Cong., 1st Sess. 3 (1979)). For example, the Department of Transportation reported a 42% increase in motor carrier accidents resulting in death or injury between 1975 and 1978, and pointed to a "disturbing trend"

[15] The safety provisions contained in the 1982 statute are virtually identical to provisions contained in a bill that was passed by the Senate in 1980, but died in the House of Representatives. See S. 1390, 96th Cong. 2d Sess. (1980). The legislative history of the 1982 statute makes clear that the 1980 bill—and a 1978 bill that was the predecessor of the 1980 bill—were the sources of the 1982 provisions. See 128 Cong. Rec. S15609 (daily ed. Dec. 19, 1982) (remarks of Sen. Danforth); *id.* at S14018-S14019 (daily ed. Dec. 7, 1982); see also *Highway Revenue Act of 1982: Hearing on S. 3044 Before the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 45 (1982) (statement of R.V. Durham) (suggesting incorporation of provisions of S. 1390 into the 1982 bill). The legislative histories of these earlier measures therefore are relevant in analyzing Congress's purpose in enacting the 1982 statute.

showing that truck accidents were increasing at a rate faster than the increase in the number of miles traveled by such vehicles. *Truck Safety Act: Hearings on S. 1390 and S. 1400 Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 1, 71, 84-85 (1979) [hereinafter cited as *Truck Safety Act Hearings*]. In 1982, truck accidents resulted in over 2,800 deaths, 28,500 injuries, and $355 million in property damage (128 Cong. Rec. S15609 (daily ed. Dec. 19, 1982) (remarks of Sen. Danforth)).

Congress found that a major reason for this increase in the danger on the nation's highways was that "[f]ederal commercial motor vehicle safety rules [were] being flagrantly ignored" (S. Rep. 96-547, *supra*, at 3). During a random spot check of commercial trucks by the Department of Transportation, 44% of all vehicles inspected were ordered out of service because they were found to have serious safety violations. *Truck Safety Act Hearings* 71 (statement of John S. Hassell, Deputy Administrator, Federal Highway Administration). Large percentages of safety violations also were detected in the course of other inspection efforts. *Id.* at 56, 67 (statement of Sen. Percy); *id.* at 82 (statement of John S. Hassell).[16] Congress concluded that "[t]his pattern of

[16] In hearings on the 1978 truck safety bill, Senator Cannon, the chairman of the Senate Commerce Committee, noted that "one-third of the 54,800 trucks and buses inspected by Federal personnel during 1974 and 1975 were unsafe and taken off the road until repaired." *Truck Safety Act of 1978: Hearing on S. 2970 Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 2d Sess. 1 (1978) (statement of Sen. Cannon); see also *id.* at 2 (54% of vehicles stopped on the basis of visual inspection were ordered out of service

noncompliance with commercial motor vehicle safety requirements demonstrates that federal enforcement efforts have proven ineffective, and this pattern will continue as long as these violations are likely to go undetected" (S. Rep. 96-547, *supra*, at 4). It decided to adopt "a systematic and integrated approach to remedying the present regulatory deficiencies in the commercial motor vehicle safety area." *Ibid.*; see also 128 Cong. Rec. S15610 (daily ed. Dec. 19, 1982) (remarks of Sen. Danforth).

One important element of this new motor vehicle safety program was the employee protection provision at issue in this case. Congress recognized that "employees and others in the commercial motor vehicle safety area are often in the best position to provide early detection of safety and health violations. Therefore, the legislation's complaint investigation and 'whistle-blower' protection provisions are directed to providing significant assistance to federal enforcement activities." S. Rep. 96-547, *supra*, at 4; see also *id.* at 17; 128 Cong. Rec. S14648 (daily ed. Dec. 14, 1982) (section-by-section analysis submitted by Sen. Baker) (stating in relation to the employee protection provision that "[e]nforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies, and the Department of Transportation").

Senator Percy, the original author of the employee protection provision, explained that employees must be insulated against economic retaliation if they are

until violations were corrected because "in the judgment of the inspectors [the violations] were likely to cause accidents"); *id.* at 28-33 (summary of results of Department of Transportation roadside safey inspection).

to assist in the enforcement of safety standards: "Because truck drivers are threatened with firing for cooperating with enforcement agencies, or for refusing to drive hazardous or overloaded vehicles, they have little choice other than to comply with their employer's instructions to violate the law. But, with the 'whistle-blower' protection of this legislation, drivers will be given the protection to refuse to violate the law." 128 Cong. Rec. S15769 (daily ed. Dec. 20, 1982); see also 128 Cong. Rec. S15610 (daily ed. Dec. 19, 1982) (summary of safety provisions submitted by Sen. Danforth) (the anti-retaliation provision "underscore[s] the strong Congressional policy that persons reporting health and safety violations should not suffer because of this action").

This Court has affirmed in other contexts the judgment made by Congress here—that a program dependent upon the participation of employees to secure compliance with regulatory standards will be successful only if employees are protected against economic retaliation. In *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), for example, the Court considered the employee protection provisions of the Fair Labor Standards Act. Observing that Congress "chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied," the Court concluded that "[p]lainly, effective enforcement could * * * only be expected if employees felt free to approach officials with their grievances" (361 U.S. at 292). Since "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions," the statute's "proscription of retaliatory acts" served to "foster a climate in which compliance with the substantive provisions of the Act would be enhanced."

Ibid.; see also *NLRB* v. *Scrivener*, 405 U.S. 117, 122 (1972) (citation omitted) (anti-retaliation provision of the National Labor Relations Act necessary " 'to prevent the [government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses' "); *Donovan* v. *Square D Co.*, 709 F.2d 335, 338 (5th Cir. 1983) (Occupational Safety and Health Act); *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F.2d 772, 778-783 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975) (Federal Coal Mine Health and Safety Act).[17]

Section 405 similarly encourages employees to report statutory violations and cooperate in agency investigative efforts by eliminating the possibility of employer retaliation. The provision thus plays an important role in furthering the compelling governmental interest in highway safety.

The district court acknowledged that "the governmental interests in promoting safety on the highways and prohibiting retaliatory discharge are indeed valid," but concluded that these interests "would not be impaired by requiring a hearing prior to reinstatement" (J.S. App. 8a). This determination reflects a serious misunderstanding of the purpose of the temporary reinstatement remedy designed by Congress.

As a threshold matter, the district court erred by dismissing out of hand Congress's determination—reflected in the terms of the statute—that a tempo-

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[17] The fact that the reinstatement remedy " 'operate[s] to confer an incidental benefit on private persons does not detract from [its] public purpose' " (*Donovan* v. *Square D Co.*, 709 F.2d at 338 (citation omitted)). Rather, "[w]hile remedial, th[e] provision operates primarily toward furthering the public statutory goals" (*ibid.*).

rary reinstatement remedy is necessary to further the legislative purpose underlying the statute. Absent evidentiary support for its contrary determination, the district court was not free to ignore Congress's judgment that this remedy plays an important part in furthering the statutory goal by encouraging employees to come forward with safety complaints. Cf. *Walters* v. *National Association of Radiation Survivors*, slip op. 17.

Moreover, the court wholly failed to appreciate the importance of temporary reinstatement of an employee who, there is reasonable cause to believe, has been wrongfully discharged for safety complaints. The purpose of Section 405 is to provide employees with as much protection as possible from retaliation by employers so that employees will feel free to report safety violations. An employee is likely to view the speed with which he will be reinstated to his previous position as an important element of this protection. As one truck driver stated in House committee hearings on the subject of motor carrier safety, "[t]he promise of back pay years down the road just is not enough protection when your car has been repossessed, your mortgage foreclosed, and your marriage broken up in the meantime." *Commercial Motor Carrier Safety: Hearing Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 96th Cong., 2d Sess. 35 (1980) (statement of Mel Packer); see also *Truck Safety Act Hearings* 160-161.

The Court "frequently [has] recognized the severity of depriving a person of the means of livelihood" (*Loudermill*, slip op. 9). The longer the discharged employee remains unemployed, the more devastating the financial consequences are likely to be. And even

if the discharged employee finds employment elsewhere, he may be forced to accept a reduced salary because he "is likely to be burdened by the questionable circumstances under which he left his previous job" (*ibid.*). Since the length of the delay prior to reinstatement thus affects the employee's ability to support himself and his family, it is likely to be the most significant factor considered by an employee deciding whether to exercise the rights protected by Section 405.

Congress plainly was concerned about the speed of the remedial process under Section 405. Its decision to authorize the Secretary of Labor to consider employees' complaints instead of permitting employees to commence lawsuits against their employers rested upon the determination that "[r]edress through the court system is a very expensive and time-consuming process." 128 Cong. Rec. S14648 (daily ed. Dec. 14, 1982) (section-by-section analysis submitted by Sen. Baker); see also S. Rep. 96-547, *supra*, at 6 (discussing necessity for "rapid action" by Department of Labor). Congress obviously determined that an expeditious, temporary remedy also was necessary to fulfill the provision's purpose of encouraging employees to come forward with safety-related information.

Requiring the Secretary to afford the employer an evidentiary hearing before ordering the temporary reinstatement of a discharged employee would thwart the accomplishment of Congress's purpose by delaying relief for employees who engage in safety-related activity. Indeed, the employer would be able to make use of the hearing and any possible appeal to delay the reinstatement of the employee. Cf. *Mathews*, 424 U.S. at 347 ("the fact that full benefits would con-

tinue until after such hearings would assure the exhaustion in most cases of this attractive option"). Mandating a prereinstatement evidentiary hearing thus would enable employers to continue to retaliate against an employee by prolonging the employee's unemployment. Such a vivid demonstration of the limited nature of the statutory protection undoubtedly would discourage other employees from engaging in safety-related actions, chilling the very conduct that Congress sought to promote when it enacted Section 405. The full force of the government's compelling interest in highway safety is therefore implicated by the temporary reinstatement remedy set forth in that provision.

The district court also ignored the fact that requiring a prereinstatement evidentiary hearing would impose additional fiscal and administrative burdens upon the government. See *Walters*, slip op. 15 & n.9. As we have discussed, employers undoubtedly would request prereinstatement evidentiary hearings in virtually every case, and "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews*, 424 U.S. at 347; see also *Dixon* v. *Love*, 431 U.S. at 114. Accordingly, the government interest in conserving public funds is also relevant in determining the process that is due in this context.

3. The risk of erroneous deprivation

An assessment of the risk that an employer will be erroneously deprived of his property interest requires consideration of two separate factors. First, it is necessary to evaluate the procedures followed by the Secretary prior to the issuance of a temporary reinstatement order to ascertain the effectiveness of those

procedures in limiting the risk of an erroneous determination. Second, the value of the additional procedures proposed by appellee and the district court must be considered. Of course, "the [Due Process] Clause does not require that 'the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error.'" *Walters*, slip op. 14-15, quoting *Mackey* v. *Montrym*, 443 U.S. at 13. "[W]hen prompt postdeprivation review is available for correction of administrative error, [the Court has] generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be" (*Mackey*, 443 U.S. at 13). This standard is satisfied by the procedure utilized by the Secretary in the present context.

The risk that the Secretary will erroneously issue a temporary reinstatement order is reduced significantly by the procedures that precede the issuance of such an order.[18] As soon as a complaint is re-

[18] Appellee refers several times to an "ex parte decision-making process" (Mot. to Aff. 8, 14), even though the Secretary's written procedures require that an employer be given notice of the charges against it and an opportunity to present its views. Appellee may be arguing that only the provisions of the statute—and not the procedures utilized by the Secretary in deciding whether to issue the temporary reinstatement order—may be considered in evaluating the constitutionality of the process afforded under Section 405. That position is plainly incorrect. In *Barry* v. *Barchi*, *supra*, for example, the Court concluded that the requirements of due process were satisfied by the informal procedures utilized in issuing the interim suspension of the trainer, even though these procedures were not specified in the statute (443 U.S. at 60-61 n.8, 65-66).

ceived from an employer, an experienced investigator begins a thorough investigation to determine whether the allegations of the complaint are supported by independent evidence (J.A. 78-79). The employer is informed of the allegations of the complaint and of the substance of the case against him.[19] The employer is also afforded a full opportunity to state his position and provide documentary evidence and oral testimony in support of that position. *Ibid;* see also pages 5-6 note 3, *supra.* Finally, a temporary reinstatement order is issued only if the Secretary finds credible evidence establishing "reasonable cause to believe" that the discharge of the employee was retaliatory (49 U.S.C. App. 2305(c)(2)(A)).[20]

These procedures were followed in the present case (J.A. 79). First, appellee was notified of the allegations made by employee Hufstetler.[21] Second, Labor

[19] The Secretary's procedures specifically provide that the employer must be informed of the allegations of the complaint. OSHA Instruction DIS.4A, at V5 (Aug. 26, 1985). Although the procedures do not in terms require the Labor Department investigator to inform the employer of the substance of the evidence supporting the employee's allegations, that requirement is implicit in the investigator's obligation to obtain the employer's response to those allegations. The Department of Labor informs us that the practice followed by its investigators is to inform the employer of the substance of the evidence supporting the employee's allegations.

[20] The evidence is reviewed by several Labor Department officials before a temporary reinstatement order is issued. The investigator, the supervisory investigator, a representative of the Office of the Solicitor of Labor, and the Regional Administrator each consider the sufficiency of the evidence developed in the investigation. J.A. 93-94.

[21] The record does not indicate whether appellee was informed of the substance of the evidence supporting the allega-

Department investigators conducted a thorough 11-month investigation and found "credible, independent evidence" supporting Hufstetler's claim of retaliatory discharge (*ibid.*). Third, appellee submitted a written position statement explaining the circumstances of the discharge, which was supported by affidavits from witnesses favorable to appellee (J.A. 6, 79, 93). Fourth, appellee's attorney submitted a letter setting forth appellee's legal arguments and orally presented appellee's side of the story in a meeting with Labor Department officials (J.A. 6-7, 93). Finally, the Secretary's designee reviewed the evidence and determined that there was "reasonable cause to believe" that Hufstetler had been discharged in violation of Section 405 (J.S. App. 20a-23a). These procedures clearly provided the "initial check against mistaken decisions" required prior to a temporary deprivation of property. *Loudermill,* slip op. 12; see also pages 19-23, 39, *supra.*

The district court found that the Secretary's pre-reinstatement procedures did not sufficiently reduce the risk of an erroneous decision and concluded that an employer also must be provided with an eviden-

tions. Appellee's reference (Mot. to Aff. 4) to "secret evidence gathered during the investigation from unknown parties" rings somewhat hollow, however, in view of the fact that the prior arbitration proceeding enabled appellee to become familiar with all of the circumstances relevant to the propriety of the discharge. Indeed, a comparison between the relevant portion of the temporary reinstatement order (J.S. App. 21a-22a) and the record of the arbitration proceeding (J.A. 40-76) indicates that the factors that influenced the Secretary had been brought out during that proceeding. Appellee therefore cannot claim that it was denied due process because it was not informed of the evidence supporting Hufstetler's allegations.

tiary hearing and the right to confront and cross-examine witnesses prior to the issuance of a temporary reinstatement order (J.S. App. 7a-8a). Each of these determinations is incorrect.

The basis for the district court's requirement of a prereinstatement evidentiary hearing was its conclusion that the Secretary's procedures "were inherently unreliable, inasmuch as they did not provide any means for resolving disputed issues of fact and credibility" (J.S. App. 8a). However, even where the propriety of a temporary deprivation of property turns upon a factual dispute, this Court's decisions do not require the government to stay its hand pending the conclusion of an evidentiary hearing. In *Loudermill*, for example, the Court found that notice and an opportunity to be heard satisfied due process even though dismissals of employees for cause "often involve factual disputes" and the propriety of the discharge at issue in that case turned upon a credibility determination—the "subjective question whether [the employee] had lied on his application form" (slip op. 9, 10 & n.9).

Similarly, in *Barry* v. *Barchi*, *supra*, the trainer's assertion that he was not negligent in connection with the drugging of the race horse raised an issue regarding both his own credibility and the reliability of the evidence against him, but the Court did not require an evidentiary hearing prior to the temporary license suspension (443 U.S. at 64-66). Thus, the Court has already concluded that a predeprivation evidentiary hearing is not always necessary "to resolve questions of credibility or conflicts in the evidence" (*Mackey* v. *Montrym*, 443 U.S. at 15).[22]

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[22] Appellee's argument to the contrary (Mot. to Aff. 10-13) is simply incorrect. The portion of Justice Brennan's concurring and dissenting opinion cited by appellee (*id.* at 13) in support of its assertion that *Loudermill* did not involve a factual dispute appears to conflict with the majority's view of the case. Moreover, appellee erroneously states that *Barry* involved a statute holding a trainer "to the standard of an 'insurer'" (Mot. to Aff. 12). In fact, the statute simply established an evidentiary presumption that the trainer was free to rebut (443 U.S. at 59 & n.6). Since the trainer's statement obviously was relevant in determining whether the presumption had been rebutted, the propriety of the government action turned in part upon the trainer's credibility.

The Court's conclusion in *Goldberg* v. *Kelly*, *supra*, that an evidentiary hearing is required prior to the termination of welfare benefits did rest in part upon the observation that "written submissions are a wholly unsatisfactory basis for decision" when "credibility and veracity are at issue" (397 U.S. at 269). But the Court did not rely solely upon that rationale in requiring an evidentiary hearing. It also found that written submissions "are an unrealistic option for most [welfare] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance," and that a welfare recipient could not present his position "secondhand through his caseworker" because "the caseworker usually gathers the facts upon which the charge of ineligibility rests" (*ibid.*).

The justifications that supported the *Goldberg* Court's determination simply do not apply in the present context. First, employers such as appellee do not in any way resemble welfare recipients who cannot "write effectively" or "obtain professional assistance." The present case demonstrates that appellee, which is one of the nation's largest trucking concerns

(J.A. 80), is able to obtain high caliber professional assistance in presenting its views.

Second, the Court's general observations regarding the disadvantages of written submissions in a case that involves credibility determinations are irrelevant here because appellee was not limited to submitting written evidence. The Secretary's written guidelines for the investigation of employee complaints direct Department of Labor investigators to ask the employer to identify favorable witnesses, who then may be interviewed by the investigator. The employer is also permitted to state its position for the investigator. OSHA Instruction DIS.4A, at V5-V6 (Aug. 26, 1985); see also pages 5-6 note 3, *supra*. Thus, the employer is not precluded from presenting oral testimony that is relevant to the legality of the discharge.

Third, in the present context, unlike the situation involving welfare recipients, there is no reason to require direct presentation of this oral evidence to the decisionmaker. The complaint under Section 405 is filed by the employee, not the Secretary of Labor. The Labor Department investigator is charged with gathering all relevant facts and acts essentially as the agent of the decisionmaker. Thus, unlike a welfare caseworker, who the Court in *Goldberg* indicated might be biased against the recipient because he had prepared the charge of ineligibility (397 U.S. at 269), the Labor Department investigator has no prior involvement suggesting any reason why he would not accurately convey to the decisionmaker the evidence presented by the employer's witnesses.[23]

[23] The Court in *Goldberg* also observed that "[i]n almost every setting where *important decisions* turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses" (397 U.S. at 269 (emphasis added)). The Court tied this procedural requirement to the magnitude of the interest at stake in the proceeding. As we have discussed (see pages 28-30), appellee's interest is considerably less significant than a welfare recipient's interest in continued benefits.

Finally, the Secretary's determination is, of course, only preliminary; an evidentiary hearing is held prior to a final decision regarding the legality of the discharge. Indeed, the ultimate factual issue in this case—ascertaining the reasons for the discharge of an employee—is identical to the ultimate issue in cases involving due process challenges to the termination of government employees. Since an evidentiary hearing is not necessary before making a preliminary determination in the latter context (see *Loudermill*, slip op. 12), it similarly should not be required to ensure the accuracy of a preliminary determination in the present setting.

The district court noted that the Secretary did not "make available [to appellee] the names and statements of witnesses upon which its decision was based" (J.S. App. 7a) and appellee appears to argue that the Secretary should be obligated to disclose this information prior to the issuance of the temporary reinstatement order, even if the evidentiary hearing is not held until after the issuance of the order (Mot. to Aff. 4, 11). However, there is no basis for the contention that appellee was entitled to this information in advance of the post-reinstatement evidentiary hearing.

At the outset, making this information available to the employer would contribute only marginally to the accuracy of the preliminary determination. Since the employer will be aware of the employee's charges and the substance of the evidence supporting the

charges, the only conceivable purpose that could be served by disclosure of the witnesses' statements and identities is to permit the employer more easily to discredit these witnesses. Deferring such challenges until the evidentiary hearing will not undercut the accuracy of the preliminary determination because, even at the preliminary stage, credibility challenges can be based upon the employer's rebuttal of the substance of the witness's testimony. See Friendly, *supra*, 123 U. Pa. L. Rev. at 1286 (suppression of the names of witnesses and curtailment of access to adverse evidence is permissible when "the decision is preliminary").

Moreover, disclosure of a witness's identity at this early stage of the proceeding presents a very real threat to the integrity of the complaint investigation process. Common sense suggests that the very retaliation and coercion that Congress sought to prevent in enacting Section 405 could be directed against employees who support a discharged employee's retaliation claim. In *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Court recognized this possibility in a related context. It held that witness statements in a pending unfair labor practice proceeding are exempt from disclosure under the Freedom of Information Act because of the risk that unions or employees "will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." 437 U.S. at 239; see also *Cuccaro* v. *Secretary of Labor*, 770 F.2d 355, 359-360 (3d Cir. 1985) (upholding nondisclosure of names of witnesses in OSHA investigation for similar reasons); *L & C Marine Transport, Ltd.* v. *United States*, 740 F.2d 919, 921-925 (11th Cir. 1984) (same); cf. *Wolff*

v. *McDonnell*, 418 U.S. 539, 567-569 (1974) (holding that confrontation and cross-examination of witnesses are not required in context of a prison disciplinary proceeding because of the "high risk of reprisal" and the danger that the witness "may refuse to testify or admit any knowledge of the situation in question").[24]

The employer will, of course, learn the identity of the witness in the pre-hearing exchange of witness lists or when the witness takes the stand at the post-reinstatement evidentiary hearing.[25] Maintaining the confidentiality of the witness's identity prevents the employer from taking coercive action designed to deter the witness from testifying at the hearing. Disclosure of this information, on the other hand, is not likely to have a measurable effect on the accuracy of the preliminary determination. For these reasons, disclosure of witnesses' statements and identities should not be required in the preliminary stage of the proceeding.

4. *Balance of the factors*

The foregoing discussion makes clear that Section 405 provides an employer with all the prereinstate-

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[24] The Court indicated in *Mathews* v. *Eldridge*, *supra*, that the "policy of allowing the disability recipient's representative full access to all information relied upon by the state agency" provided a "further safeguard against mistake" (424 U.S. at 345-346). However, the Court did not state that disclosure of all such information was a necessary element of due process. In *Loudermill*, for example, the Court stated only that the party to be deprived of a property interest must be afforded "an explanation of the [adverse] evidence" (slip op. 12).

[25] A copy of the witness's interview statement is supplied to the employer when the witness begins to testify.

ment process that is required by the Due Process Clause. The governmental interest furthered by the temporary reinstatement remedy is the compelling interest in promoting highway safety, which is no less weighty than the governmental interests implicated in this Court's previous cases. The private interest of the employer that is affected by the temporary order, on the other hand, is not very significant and is offset by the employee's interest in not being temporarily discharged for what may prove to be an improper reason. A balancing of the interests therefore indicates that only minimal procedural protections should be required prior to the issuance of a temporary reinstatement order. The procedures followed by the Secretary are plainly sufficient to satisfy this requirement. Indeed, it is settled that the government may terminate an employee's interest in continued employment after affording the employee notice and an opportunity to respond (*Loudermill*, slip op. 9-11); the same process therefore must be sufficient to protect the employer's less weighty interest in removing unsatisfactory employees.

At bottom, the question in this case is whether Congress acted reasonably in determining that an employer subject to the requirements of Section 405—rather than the discharged employee—should bear the expenses associated with a disputed discharge, pending a final disposition of the merits of the claim, where the Secretary's preliminary view is that there is reasonable cause to believe the employee's side of the story. In view of the significantly smaller economic burden that is imposed upon the employer, and the importance to the success of the highway safety program of affording strong anti-retaliation protection, Congress's judgment should be upheld. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15

(1976) (discussing Congress's preeminent authority to "adjust[] the burdens and benefits of economic life").

Of course, "[t]he duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." *Mackey* v. *Montrym*, 443 U.S. at 12; see also *Loudermill*, slip op. 13 ("[a]t some point, a delay in the [post-deprivation] hearing would become a constitutional violation"). Here, Section 405 itself provides the necessary post-reinstatement procedural protections. It states that the post-reinstatment hearing "shall be expeditiously conducted," and sets a time limit for the issuance of a final order. 49 U.S.C. App. 2305(c)(2)(A); see also page 6 and note 4, *supra*.

The Court has indicated that even if a statute provides for a prompt post-deprivation hearing and the statutory scheme therefore complies with due process, the delay in a particular case may amount to a violation of due process. *Loudermill*, slip op. 13; *Barry* v. *Barchi*, 443 U.S. at 66. There is no occasion to consider the permissibility of the delay in the present case because appellee never was subjected to a deprivation of property—enforcement of the Secretary's order was enjoined by the district court. Accordingly, appellee cannot complain that its due process rights were violated by the length of the delay in issuing a final order.[26]

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[26] The time between the issuance of the temporary reinstatement order and the ALJ's issuance of his recommended decision—approximately nine months—is within the time limits that this Court previously has held to be permissible. See *Loudermill*, slip op. 13; *Mathews*, 424 U.S. at 342. The delay in the issuance of the Secretary's final decision in this

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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case is the result of a dispute regarding the ALJ's decision and the state of the evidentiary record. See Mot. to Aff. 5-6 n.4, A1-A9. There is no reason to believe that this delay is typical of proceedings under Section 405.

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